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In the
**Supreme Court of the United States**
October Term, 2004

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S. D. WARREN COMPANY,
*Petitioner,*
v.
MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
*Respondent.*

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On Writ of *Certiorari* to
the Supreme Judicial Court of Maine

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# BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

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## QUESTION PRESENTED

Does the mere flow of the Presumpscot River through Warren's existing dams constitute a "discharge into" the Presumpscot River under section 401 of the Clean Water Act?

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## INTEREST OF *AMICUS CURIÆ*

*Amicus Curiæ* New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views and the views of its supporters on the question whether the mere flow of water through a privately-owned hydroelectric dam results in a discharge within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a). In the decision below, the Supreme Judicial Court of Maine ("SJC") answered this question in the affirmative with respect to the dams owned and operated by Petitioner S.D. Warren Company ("Warren") on the Presumpscot River ("River") in Maine. As *Amicus* demonstrates herein, the SJC's decision was incorrect and should be reversed.[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or

*Amicus Curiæ* NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon an application of the federal laws enacted to protect the environment, such as the Clean Water Act ("CWA"), 33 U.S.C. §§1251, *et seq.*, in a way that fairly reflects Congress's intentions as embodied in such statutes. Especially in a time of diminishing oil and gas reserves, it is important that costly and possibly duplicative regulatory requirements be imposed on renewable sources of energy, such as hydroelectric dams, only if they are well grounded in the provisions of the CWA. NELF's members and supporters believe that a balanced and reasonable approach to regulation, which respects the economic efficiencies of free market forces, is essential for the maintenance of a robust business climate, which in turn is essential to the long-term success of the region's businesses.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business

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in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

communities.[2] *Amicus* believes that serious negative consequences for all businesses and other activities that involve use of the national waterways may well result from the SJC's novel and manifestly erroneous expansion of the meaning of "discharge" as used in Section 401(a) of the CWA. *Amicus* believes that this brief provides an additional perspective which may aid the Court in determining the issue presented. Pursuant to Supreme Court Rule 37.2 (a), counsel for Amicus has submitted consents by all parties to the filing of this Brief.

## STATEMENT OF THE CASE

*Amicus* adopts the Statement of the Case contained in the Brief of Petitioner S.D. Warren Company ("Warren").

## SUMMARY OF ARGUMENT

The SJC determined that a discharge occurs within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), merely from the operation of Warren's dams on the River. In reaching this conclusion, the SJC engaged in a startling departure from prior federal jurisprudence under the CWA, including the recent decision by this Court in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004) (*"Miccosukee"*). Eschewing these precedents, the Maine court applied a novel test to determine the existence of a discharge, holding that a purported change in the legal status of the River's waters from public to private as they pass through Warren's dams, followed instantaneously by their

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2 *See, e.g., Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

alleged transformation back into waters of the United States as they emerge, constitutes an "addition" sufficient for a finding that a discharge occurs under Section 401(a). The Maine Court's new test is manifestly incorrect for at least three reasons. First, the SJC's premise that while in Warren's dams the River's waters are no longer waters of the United States is erroneous as a matter of law. Second, the SJC's test directly contradicts this Court's decision in *Miccosukee* which confirms that where, as in this case, water is merely transferred from one portion of a body of water to another portion of the same body of water, no addition—and, therefore, no discharge—can occur within the meaning of Section 401(a). Finally, the SJC's decision is erroneous because the purported change in the waters' status upon which the Maine court relied, even if true, could never satisfy the purposes underlying Section 401(a) and the Maine court's decision ignores the careful regulatory balance Congress struck when it enacted that statutory provision.

## ARGUMENT

### I. The SJC's holding that while flowing through Warren's dams the River's waters cease to be waters of the United States is wrong as a matter of law.

The primary issue before the SJC in this case, and the single issue before this Court, is whether the operation of Warren's five hydroelectric dam projects on the River results in a "discharge" to the waters of the River within the meaning of Section 401(a) of the CWA. The issue arises because of the interplay between the federal regulatory scheme governing hydroelectric dams and the CWA.

The Federal Power Act ("FPA"), 16 U.S.C. §§ 791a, *et seq.*,

vests in the Federal Energy Regulatory Commission ("FERC") the responsibility for licensing the construction, operation and maintenance of hydroelectric dams, such as the dams owned and operated by Warren that are at issue in this case. 16 U.S.C. § 797(e). Section 401(a) of the CWA, 33 U.S.C. § 1341(a), provides that, where an applicant is seeking a federal license for any activity that "may result in any *discharge* into the navigable waters" (emphasis added) the applicant must provide the licensing agency with a certification from the state in which that discharge may occur that the discharge will be in compliance with the water quality standards of both the CWA and ~~the a~~ffected state. 33 U.S.C. § 1341(a). Accordingly, where the owner and operator of a hydroelectric dam applies to FERC for a renewal of its federal license pursuant to the FPA, it must obtain state water quality certification *if* the operation of its dam results in a "discharge" within the meaning of Section 401(a) of the CWA.

In this case, Warren applied to FERC for the re-licensing of the five hydroelectric dam projects that it owns and operates on the River. Because of the interplay of the FPA and Section 401(a) of the CWA, Warren was required to apply for water quality certification from the Maine Department of Environmental Protection ("DEP"). This Warren did under protest. Warren's position was, and remains, that the operation of its dams does not result in a discharge into the waters of the River. Therefore it asserts that no DEP certification is required under Section 401(a).

Warren's argument that the activities of its dams do not cause a discharge under Section 401(a) is based on the legal requirements of the CWA and the undisputed facts

surrounding the dams' operations. Under the CWA, for there to be a discharge within the meaning of Section 401(a) there must be an "addition" of something to the water body at issue. *See* Section 502(12) of the CWA, 33 U.S.C. §1362(12);[3] *North Carolina v. FERC*, 112 F. 3d 1175, 1188 (D.C. Cir. 1997) (because the volume of water passing through the dam's turbines decreased, there was no addition and, therefore, no discharge). It is undisputed that Warren's hydroelectric dam projects are operated in "run-of-river" mode, *i.e.*, outflow from each dam is approximately equal to inflow on an instantaneous basis during normal operating conditions, App. At A-120, and the operation of the dams neither removes nor adds any substance, not even water, from or to the river's waters, App. At A-87 to A-88, A-106 to A-110, A-120 to A-121.

Even as it agreed with the premises of Warren's argument, the SJC denied Warren's appeal. The SJC acknowledged that the operation of Warren's dams neither subtracts from nor adds to the total amount of water in the river. *S.D. Warren Co. v. Board of Environmental Protection*, 868 A. 2d 210, 216 (2005) (*"Warren"*). Likewise, it recognized that "[a]n 'addition' is the fundamental characteristic of any discharge." *Id.*, 868 A. 2d at 215 (citing *North Carolina v. FERC*, 112 F. 3d 1175, 1187 (D.C. Cir. 1997). Nonetheless, the SJC improperly altered the test to be applied and concluded that the operation of the dams results in a discharge under Section 401(a) of the CWA.

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3 33 U.S.C. § 1362(12) states: "The term 'discharge of a pollutant' and the term 'discharge of pollutants' each mean (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." (Emphasis added.)

Simply put, because the court below could not find an actual "discharge" resulting from the operation of the dams, it invented a new "control" test for determining the existence of a discharge. In a truly novel chain of reasoning, the Maine court wrongly determined that, as the river's waters flow through Warren's dams, they are no longer waters of the United States because for a few moments they are under private control. The Court then concluded "[b]ecause these waters have lost their status as *waters of the United States,* when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States.*" *Warren,* 868 A. 2d at 216 (emphasis in the original).

Whether, even if the SJC were correct, such an intangible change in the waters' status could ever amount to a discharge under Section 401(a) will be addressed in Part III, *infra.* In fact, the SJC was flatly wrong: while flowing through Warren's dams, the River's waters never cease to be waters of the United States.

As this Court has stated on numerous occasions, Congress's control over the nation's waters stems entirely from, and is only delimited by, the paramount powers granted to Congress under the Commerce Clause. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979). This power is so extensive that it is not limited to matters of navigation, but embraces all aspects in which the Nation's waters may play a role in foreign or interstate commerce. *United States v. Appalachian Power Co.,* 311 U.S. 377, 426-7 (1940) ("[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . ."). Because of the "important public interest" in the flow of waters

that "in their natural condition are in fact capable of supporting public navigation," *Kaiser Aetna*, 444 U.S. at 175, such waters cannot be privately owned. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913) ("[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable."), *quoted in Kaiser Aetna v. United States*, 444 U.S. at 175.[3]

It is undisputed that the waters of the River constitute navigable waters and, therefore, are waters of the United States.[4] If those waters ceased to be waters of the United States while in Warren's dams, it would follow that Congress would have no authority over those waters for the few moments that they are flowing through the dams. The precedents cited above, however, conclusively establish the contrary to be the case: Congressional authority over the River's waters under the Commerce Clause cannot be diminished by any private activity and is utterly unaffected by the fact that the waters may momentarily pass through a privately controlled dam. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 511 U.S. 159, 171-72 (2001) (whether water qualifies as "navigable waters" under CWA is unaffected by fact that water may not actually be navigable at any given

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3 Congress's preeminent authority in this area, and its override of private property rights, is embodied in the doctrine of the navigational servitude which, as this Court has stated, "is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser Aetna*, 444 U.S. at 175. *See, e.g., Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (erection of piers to improve navigation for the public purpose on property privately owned by a riparian owner "infringes no right of the riparian owner.")

4 This case would not exist if this were not true, since Section 401(a) of the CWA only applies when there is a "discharge into the navigable waters." 33 U.S.C. § 1341.

point). Accordingly, as Congress only has authority over United States waters and, without question, it has authority over all of the River's waters, even those momentarily in Warren's dams, the basic premise of the SJC's holding is invalid. The status of the River's waters does not change as they flow through the dams. Their exit from the dams, therefore, cannot create an "addition" to the waters of the United States, since they have never been anything else.[5]

## II. The SJC's Test Flatly Contradicts this Court's Teaching in *Miccosukee*

The SJC's change in legal control test is also legally flawed because it rests on the Maine court's erroneous view that when water is removed from a body of water, the simple redeposit of that same water back into the water body from which it came can qualify as an "addition" and, therefore, a discharge under the CWA. *Warren*, 868 A. 2d at 215. That the SJC is mistaken in this regard was made clear by this Court in *Miccosukee*.

Quoting with approval the Second Circuit's observation in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001) that, "[i]f one takes a ladle of

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5 To the extent that the single case relied upon by the SJC, *Dubois v. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), appears to hold otherwise, that holding would be wrong under the decisions of this Court cited above. In fact, however, *Dubois* does not contradict Supreme Court precedent or *Amicus's* argument. In *Dubois*, the court opined that water removed from a river and pumped through pipes to be deposited in a pond lost thereby its status as waters of the United States. 102 F.3d at 1297. Whether or not the *Dubois* court's analysis was correct (it cited to no authority supporting its view), the situation before it was so different from the facts of this case as to have no application whatsoever. Here, at most, the waters at issue are momentarily diverted from their natural flow in the River. As shown above, there is no basis to conclude that, for those moments, they lose their chief characteristic as navigable waters of the United States.

soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot," 273 F. 3d at 492, this Court in *Miccosukee* affirmed that where water is simply being moved from one part of a water body to another part of the same water body, there cannot be an "addition" under the CWA. 541 U.S. at 109.

Here, the flow of the River's waters through Warren's dams does not alter the fact that the River remains, and is linguistically and factually recognized to be, a single body of water. Moreover, as noted above, it is undisputed that nothing extraneous is added to the River's waters as they pass through the dams. Plainly, then, under *Miccosukee* what occurs as a result of the operation of Warren's dams, *i.e.*, the physical removal from and the replacement of the same water into the same body of water, cannot qualify as an "addition" under the CWA.[6] From this the conclusion is inescapable that the SJC erred when it concluded that a purported theoretical "removal" and "redeposit" based purely on an alleged brief change in legal status could ever constitute a "discharge" under the CWA.

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6 *Miccosukee* makes it clear that, to the extent that the Presumpscot River's waters arguably are diverted from their natural path as they pass through Warren's dam projects, no addition under the CWA has occurred. As the Court observed, "[t]he [respondent] does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of any pollutants." 541 U.S. at 108. Likewise, a diversion of the Presumpscot River's waters through Warren's dams cannot constitute an addition under *Miccosukee*'s teaching.

## III. The SJC's decision must be reversed because a mere change in legal status cannot satisfy the purposes underlying Section 401(a)

In finding that the operation of Warren's dams results in an "addition" and, therefore, a "discharge" under Section 401(a), the Maine court expanded the meaning of those terms under Section 401(a) beyond anything that Congress intended. It ignored the careful balance that Congress struck in Section 401 of the CWA between federal and state regulatory authority over the nation's waters. Under the plain meaning of Section 401(a), only where the operation of a federally licensed activity results in an actual addition to the nation's waters is the additional layer of state regulation mandated. In a case such as this, where no such actual addition has occurred, Congress has concluded that only federal regulation is required. Because, by focusing on a mere change in status as opposed to whether an actual addition has occurred, the Maine court violated this careful regulatory balance, its decision that the operation of Warren's dams results in a discharge to the River should be reversed.

Simply put, even if the SJC were correct that while in Warren's dams the River's waters lost their status as waters of the United States, its decision would still have to be reversed because a mere intangible change in the water's status could never amount to a discharge under Section 401(a). As noted above, *see pp. 5-6, supra,* although the SJC conceded that, for there to be a discharge within the meaning of the Section 401(a) there must be an "addition," it ultimately ignored what that word means. In contrast, other courts that have been called upon to determine whether a discharge has occurred and,

therefore, asked to determine the meaning of an "addition" in the context of the CWA have applied a common sense, normal English language meaning to that term. The word "addition" is commonly defined to mean "something added." *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) at 20. In the context of the CWA, to add "something" has been found consistently to mean the actual addition of something from outside to the water body at issue, *see, e.g., Greenfield Mills Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) (addition consists of "discharge of dredged material, such as that removed from the supply pond, into a contiguous body of water or wetland"), and not to a mere change in name, title or control. Indeed, without more, these latter changes—such as the change that the SJC purported to identify in this case, *i.e.*, the river water's alleged temporary loss of status as United States waters—can have no impact whatsoever on the actual water itself. Logically, therefore, the test for an "addition" under section 401(a)—and the basis upon which potentially duplicative state regulation is required--cannot hinge on such factors.

The disconnect between the SJC's decision and Congress's intent as set forth in Section 401 is demonstrated by the fact that the Maine court's approach proves too much and, if followed, would lead to absurd results. Thus, under the SJC's test all non-federally operated dam projects, without exception, would result in a discharge within the meaning of Section 401(a), because all such projects would inevitably result in "private control" of the waters of the United States, whether or not an actual addition to the water has occurred. As the SJC itself recognized, "Warren is not adding more water to the river." *Warren*, 868 A.2d at 216. To find that a discharge has

occurred in these circumstances makes the discharge requirement of Section 401(a) totally meaningless. Further, the SJC's test arguably would require a finding that an "addition" has occurred even where a dam's operation actually reduces the volume of water in a river, because even a smaller volume of water reentering the river after passing through the dam would still be "an addition *to the waters of the United States.*" *Warren,* 868 A.2d at 216 (emphasis in the original). Such a result would contradict the holding in *North Carolina v. FERC, supra,* 112 F.3d at 1188, which the SJC cited in another connection with favor (*Warren,* 868 A.2d at 215), that there cannot be an addition and, therefore, there cannot be a discharge under the CWA where there is a decrease in the volume of water passing through a dam's turbines.

As these absurd outcomes demonstrate, the SJC's decision violates the purpose for which Congress enacted Section 401 of the CWA and should be reversed.

## CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Supreme Judicial Court of Maine and hold that there is no discharge within the meaning of Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), as a result of the operation of Warren's dams.

Respectfully submitted,

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